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No. 06-1318

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SUPREME COURT, U.S.

In the Supreme Court of the United States

RALPH OVADAL,

Petitioner,

v.

CITY OF MADISON, WISCONSIN, RICHARD WILLIAMS, CHRIS PAULSON and PATRICK GRADY

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeal for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS RESTATED

1. Should the Supreme Court grant review even though no circuit court split exists as to the application of the independent judgment rule in First Amendment cases and even though the Seventh Circuit applied the correct standard of review to the specific facts germane to the case before it?

2. Is a municipality without any ability to regulate on a content-neutral basis a demonstration that creates a dangerous traffic hazard for those traveling on a high-speed freeway?

TABLE OF CONTENTS

PAGE

QUESTIONS RESTATED. i

TABLE OF AUTHORITIES. iv

STATEMENT OF THE CASE. 1

REASONS FOR DENYING THE PETITION. 10

I. SUPREME COURT PRECEDENT ON THE STANDARD OF REVIEW IN FIRST AMENDMENT CASES IS WELL-SETTLED. 12

II. THE CIRCUIT COURTS ARE IN AGREEMENT ON THE APPROPRIATE STANDARD OF REVIEW FOR FIRST AMENDMENT CASES. 14

A. The First, Second and Seventh Circuits Understand and Apply the Standard of Review Articulated in *Bose*. 14

B. The Third, Eighth and Ninth Circuits Also Understand and Apply the *Bose* Standard of Review in First Amendment Cases. 18

C. The Seventh Circuit Applied the Proper Standard of Review in This Case. 21

TABLE OF CONTENTS (Cont'd)

PAGE

III. THERE IS NO NEED TO REVIEW THE SEVENTH CIRCUIT'S UNREMARKABLE CONCLUSION THAT A CITY MAY CONSTITUTIONALLY IMPOSE A CONTENT-NEUTRAL REGULATION ON ACTIVITIES THAT CREATE SIGNIFICANT TRAFFIC AND SAFETY HAZARDS..... 23

CONCLUSION..... 28

TABLE OF AUTHORITIES

PAGE

Cases

A Woman's Choice - East Side Women's Clinic v. Newman, 305 F.3d 684 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003). 16-17, 21

Agfa Corp. v. Creo Products, Inc., 451 F.3d 1366 (Fed. Cir. 2006). 23

Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992). 25

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984). . . . . *passim*

Brazos Valley Coalition for Life, Inc. v. City of Bryan, 421 F.3d 314 (5th Cir. 2005). 25

Crawford-El v. Britton, 523 U.S. 574 (1998). 23

Duffy v. Sarault, 892 F.2d 139 (1st Cir. 1989). . . . 15, 17-18

Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm., 896 F.2d 780 (3d Cir. 1990). 18-19

FAIR v. Nebraska Dept. of Social Services, 111 F.3d 1408 (8th Cir. 1997). 19

Faustin v. City and County of Denver, 423 F.3d 1192 (10th Cir. 2005). 26

TABLE OF AUTHORITIES (cont'd)

PAGE

Frye v. Kansas City, Missouri Police Department, 375 F.3d 785 (8th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005). 26

Gustafson v. Jones, 290 F.3d 895 (7th Cir. 2002). 14-16, 21

Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989). 13-14, 22

Hill v. Colorado, 530 U.S. 703 (2000). 11-12, 27

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995). 14

Locurto v. Giuliani, 447 F.3d 159 (2d Cir. 2006). 14-15, 22

Lundell Mfg. Co. v. ABC, Inc., 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). . . . 19

MacDonald v. City of Chicago, 243 F.3d 1021 (7th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002). . . . 26

Mitchell v. Horn, 318 F.3d 523 (3d Cir. 2003). 18-19

Newton v. National Broadcasting Co., 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991). 20

New York Times Co. v. Sullivan, 376 U.S. 254 (1964). 12-14

TABLE OF AUTHORITIES (cont'd)

PAGE

Ovadal v. City of Madison, 416 F.3d 531 (7th Cir. 2005) 7

Ovadal v. City of Madison, 469 F.3d 625 (7th Cir. 2006) 21-23

Planned Parenthood v. American Coalition of Life, 290 F.3d 1058 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003) 20-21

Sanctity of Human Life Network v. California Highway Patrol, 129 Cal. Rptr. 2d 708 (Ct. App. 2003), *cert. denied*, 2003 Cal. LEXIS 6185 (2003) 26

United States v. Grace, 461 U.S. 171 (1983) 26

United States v. Israel, 317 F.3d 768 (7th Cir. 2003) 16, 21

United States v. Nelson, 450 F.3d 1201 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 326 (2006) 23

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 11, 26-27

Statutes and Provisions

Fed. R. Civ. P. 52 ..... 12, 13, 17

Supreme Court Rule 10 ..... 11, 21

STATEMENT OF THE CASE

Petitioner Ralph Ovadal is a pastor who, on numerous occasions, has exercised his First Amendment rights to express his viewpoints on religious and political issues. App. 59a-60a. He often engages in expressive activity with a number of his followers. App. 60a. In the last five years, he and his group engaged in expressive activities at some 33 different events and locations in and around the City of Madison, Wisconsin. App. 109a-110a. The target audience for his message is "the whole world." App. 61a.

During 2002 and the first eight months of 2003, Ovadal and his group expressed their religious viewpoints on homosexuality at least six times on Beltline overpasses. App. 53a, 100a. The Beltline is Madison's restricted access freeway where the average traffic speed exceeds 60 miles per hour. App. 2a. The overpasses are pedestrian walkways spanning the freeway. On those six occasions, Ovadal observed no traffic problem developing as a result of his group's activity and he and his group were not ordered to disperse. App. 100a-101a.

On Tuesday, September 2, 2003, the day after Labor Day, Ovadal and nine other individuals set up a demonstration with signs and banners on a Beltline overpass during rush hour traffic. App. 81a. The particular Beltline overpass the group selected was between the exits for Seminole Highway and Verona Road. App. 79a. The Beltline in this area is a fast moving, heavily traveled road with three lanes of traffic in each direction. App. 53a-54a. This is a notorious stretch of the Beltline for on and off traffic, with a through lane turning into an exit lane unexpectedly. App. 154a. That day, Ovadal and his group displayed two bright yellow banners, each 16 feet long by 2 3/4 feet wide, with large black lettering stating,

"Homosexuality Is Sin." App. 53a. The group had two or three additional signs, plus a large American flag. App. 82a.

Don Johnson, an off-duty deputy sheriff for Jefferson County, Wisconsin, happened to be driving on the Beltline approaching the area where Ovadal and his group were located that day. App. 144a-145a. Way ahead of him, he saw vehicles slowing down and some even slamming on their brakes and weaving out of their travel lane. App. 145a-146a. Johnson himself almost hit the vehicle in front of him. App. 145a. When he looked up briefly, he saw people holding a bright banner and yelling and waving their arms. App. 146a-148a. Johnson concluded it was a dangerous situation and that somebody was likely to get hurt. App. 148a. He called 911 to report his concerns. App. 147a. Based on what Johnson saw on the Beltline that day, the spectacle of the people with the banners and signs on the overpass was adversely affecting traffic. App. 148a. Johnson did not care what was written on the banner, but did care about a situation developing in which somebody might get hurt. App. 149a.

Madison police officer Curtis Fields also happened to be driving on the Beltline. App. 152a. Several times in traffic, he had to apply his own brakes and, at one point, had to stop his vehicle completely as traffic in his lane was not moving. App. 153a. Officer Fields tried to figure out what was causing the traffic problems; he suspected a traffic accident but did not see one. App. 153a. Then, he noted a group of about ten people on the overpass above the traffic with signs and banners. App. 154a. He saw some of the people in this group shouting down to vehicles traveling on the Beltline below. App. 296a. When Officer Fields reported his observations to police dispatch, he was told that others had already called with concerns about near crashes in the area of the Beltline where the protest was taking place. App. 154a-155a. Officer Fields was then dispatched to

the scene, where he spoke to Ovadal, the leader of the group. App. 155a-156a.

Officer Fields asked Ovadal to move his protest to a less hazardous place off the Beltline. App. 87a. He asked for cooperation in the interests of the greater good of protecting public safety. App. 88a. When Ovadal declined to relocate the protest voluntarily, Officer Fields contacted his supervisor, Sgt. Chris Paulson, to get direction on what he should do. App. 67a-69a, 156a. Initially, Sgt. Paulson instructed Officer Fields to let the demonstration continue so long as the walkway remained open to other pedestrians. App. 157a. Officer Fields conveyed that information to Ovadal and then he and his two backup officers left the overpass. App. 157a.

En route to the police district, Officer Fields received a call to return to the overpass because dispatch was receiving an increased number of calls stating that people had nearly gotten into collisions on the Beltline. App. 157a-158a. When Officer Fields arrived back at the overpass, he again appealed to Ovadal's concern for the greater good and asked his group to depart voluntarily. App. 158a. He told Ovadal about more reports of near crashes and, in response, Ovadal said near crashes happen all the time on the Beltline. App. 92a. When Ovadal again refused to leave the overpass, Officer Fields conveyed that information to Sgt. Paulson, who said that he was going to call the district attorney's office to get legal advice on what to do. App. 158a.

Sgt. Paulson communicated with Dane County Deputy District Attorney Judy Schwaemle, a 20-year veteran of the DA's office. App. 175a-176a. Sgt. Paulson questioned her about what officers could do regarding a demonstration on a Beltline overpass. The sergeant's specific concern was whether, given the demonstrators' right to protest, law

enforcement could do anything about reports that had been received regarding motorist safety. App. 176a. In response to that inquiry, Schwaemle advised Sgt. Paulson that, if genuine traffic hazards were observed, police officers could ask the demonstrators to relocate. App. 176a. She knew Sgt. Paulson intended to rely on her legal input in determining how to handle the situation. App. 177a. By the time he contacted Schwaemle, Sgt. Paulson had already been informed by dispatch of about 12 more calls reporting traffic disruption and near collisions on the Beltline in the area of the protest. App. 182a.

After receiving Schwaemle's advice, Sgt. Paulson instructed Officer Fields to order Ovadal and his group off the overpass. App. 183a-184a. Originally, Sgt. Paulson wanted to get to the site himself to directly convey the order to disperse. Traffic was so congested, however, that he had difficulty reaching the scene. App. 184a. Therefore, it fell to Officer Fields to issue the order. If the group refused to disperse, Officer Fields told them they would be cited for disorderly conduct. App. 159a. He explained to Ovadal that his group could stay on the overpass if they would put down their signs and discontinue creating the spectacle. App. 97a, 160a.

Officer Fields noticed Beltline motorists who were visibly angry as they traveled on the Beltline near the area of the protest. While he could see they were angry, he could not know whether their anger resulted from disagreement with Ovadal's message or from disgust over the traffic snarl in which they had gotten caught. App. 171a. Ovadal recalls Officer Fields saying that people were upset and mentioning a disturbance, but he does not know whether Officer Fields tied those comments to Ovadal's message or to the traffic snarl in general. App. 111a-112a.

Sgt. Paulson arrived at the scene after Ovadal and his group had already departed the overpass, but had not yet left the area. App. 162a. Ovadal peppered Sgt. Paulson with questions and Sgt. Paulson attempted to respond in a way that would end the episode and allow him and his officers to address other police business. App. 99a. Sgt. Paulson repeatedly assured Ovadal that his order that evening was not content based. App. 98a. He told Ovadal that his order would have been no different if demonstrators with great big Green Bay Packer signs were creating the same traffic hazard. App. 98a.

Sgt. Paulson declined to respond to Ovadal's question about whether he could be on the overpass at 2:00 a.m. or 3:00 a.m., a question Ovadal characterized as "hyberbole." App. 100a, 185a. Sgt. Paulson was exercising incident authority, but not policymaking authority, when he spoke to Ovadal that evening. App. 186a. Sgt. Paulson's lack of policymaking authority is something Ovadal fully understood. App. 99a. Ovadal knew that Sgt. Paulson was not the City's final policymaker on the issue of expressive activities on Beltline overpasses. App. 99a.

In response to the safety hazard, Sgt. Paulson did not consider allowing the demonstrators to maintain their position on the overpass with their signs and banners, but then sending police officers down on the Beltline to direct traffic. App. 188a. He did not consider that alternative because it was not a prudent or safe alternative. App. 188a. Directing traffic on the Beltline would have created a greater hazard. App. 222a.

On Saturday, October 11, 2003, at about 8:30 a.m., Ovadal and a group that this time numbered about 14 again chose a Beltline overpass, this one near the Park Street exit, as the site at which to display large banners and signs expressing religious and political viewpoints. App. 105a-106a. This overpass also spans six lanes of Beltline traffic. App. 53a-54a.

Sgt. Patrick Grady was traveling on the Beltline near the Park Street overpass that morning. App. 205a-206a. He saw vehicles slowing up by about 15 to 20 mph as he approached the area of the overpass. App. 206a. He looked around to determine what was causing the traffic slow down and saw a group of people on the overpass displaying banners and signs to the motorists below. App. 206a. Sgt. Grady concluded the display was creating a hazard to both eastbound and westbound traffic on the Beltline. App. 208a. He did not see anyone responding angrily to the message on display, but he did see cars slowing abruptly to look at the display. App. 209a. If he had not seen the traffic slow down and recognized the traffic hazard himself, Sgt. Grady would have simply driven by without stopping. App. 210a.

Sgt. Grady felt obliged to deal with the traffic hazard. App. 210a. He explained to Ovadal that the Beltline was a special situation because many drivers were going 60 to 70 mph and distractions to their driving created an unacceptable safety risk. App. 214a-215a.

Sgt. Grady did not tell Ovadal's group to disband. Rather, he asked the group to move their protest elsewhere. App. 209a. His response had nothing to do with Ovadal's message. Instead, it had everything to do with the fact that the display of signs and banners was causing people to slow down significantly and creating a traffic hazard. App. 209a-211a. Ovadal and his group complied with Sgt. Grady's request to leave the overpass on October 11, 2003; no citations were issued and no arrests were made. App. 54a.

On Saturday, November 8, 2003, during the late morning, Ovadal again engaged in expressive activity on a Beltline overpass, this one closer to the City of Monona. App. 108a-109a. It was a smaller group this time and they were on the

overpass from about 10:30 to 11:30 a.m. App. 109a. Ovadal observed no traffic problems resulting from the expressive activity that day. App. 109a. The overpass was under the City's jurisdiction and a Madison police sergeant interacted with the group there. App. 109a. The officer told them that complaints about the group's message would not be reason to halt the expressive activity. App. 115-116a, 141a-142a. Because there was no traffic hazard that morning, the police officer saw no reason to halt the demonstration and told Ovadal and his group they were "good to go." App. 116a.

On May 25, 2004, Ovadal filed his lawsuit in the United States District Court for the Western District of Wisconsin, alleging that the City, its former police chief, and Sgts. Grady and Paulson had violated his First Amendment rights by ordering him and his fellow demonstrators to move their expressive activities from the Beltline overpasses on September 2 and October 11, 2003 after traffic hazards had developed. In September 2004, both sides moved for summary judgment. The Court granted defendants' motion and denied Ovadal's motion, App. 37a-48a, and he appealed to the Seventh Circuit.

In a decision dated July 19, 2005, the Seventh Circuit reversed the summary judgment and remanded the case for further proceedings. *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005); App. 20a-30a. In its 2005 opinion, the Seventh Circuit noted that the key question that required further factual development was whether the City's rule that no protest may take place on Beltline overpasses when those protests cause a traffic hazard is capable of content-neutral application or whether the City had imposed a content-based and impermissible "no-Ovadal-on-overpasses" rule. App. 29a-30a. In the process of identifying that key question, the Seventh Circuit stated that a policy prohibiting not just Ovadal's but all protests and all signs on all Beltline overpasses could certainly

be a constitutional place and manner restriction on speech because it would be clearly content-neutral. App. 28a.

After remand, the district court entered a new scheduling order, setting the matter for trial in December 2005. Ovadal moved for a bench trial and that motion was granted. The bench trial took place on December 12, 2005. App. 51a. At trial, Ovadal called two witnesses and the City called six. Other evidence was admitted by stipulation. App. 7a. Notably, Ovadal called no witness to testify that he or she caused a traffic hazard on the Beltline in reaction to Ovadal's message. On the other hand, two of the witnesses called by the City, Don Johnson and Officer Fields, testified that they personally observed and were caught up in the traffic hazard without caring one way or another about the content of the demonstrators' message. App. 149a, 153a-155a.

At the completion of the evidence and the closing arguments, the district court issued its decision, dismissing Ovadal's claims. App. 246a. The next day, the district court issued a memorandum and order to amplify its oral decision from the bench. App. 11a. The district court made findings of facts and conclusions of law expressly addressing the questions highlighted by the Seventh Circuit in its remand order. App. 11a-13a. The district court held that Ovadal was not banned from the overpass on the two occasions in question because of the content of his message or the response of drivers to his message. Instead, the district court held, Ovadal was asked to leave the overpass on those two occasions because the spectacle of signs and banners on the overpass caused an observable traffic hazard. App. 12a. The Court concluded that any ban was content-neutral because it was based solely on whether a traffic hazard occurred. App. 13a. Further, the Court held that the City's response was necessary to serve the compelling governmental interest in assuring the safety of Beltline

motorists and narrowly drawn to achieve that purpose by restricting expressive activity only when an observable traffic hazard developed. *Id.* Finally, the district court determined that Ovadal had ample alternative avenues to engage in expressive activities in and around the City of Madison. *Id.*

From the judgment against him, Ovadal again appealed to the Seventh Circuit. This time, the Seventh Circuit affirmed in a decision issued on November 20, 2006. App. 1a-10a. The Court held as follows:

> The evidence at trial does not support any allegation that there was a general unwritten policy that placed content-based prohibitions on Ovadal's speech. The record indicates that Ovadal was not chilled or deterred from exercising his First Amendment rights.

App. 10a. The Seventh Circuit found "particularly telling" that Ovadal was again exercising his First Amendment rights on a Beltline overpass after the two occasions about which he complained in this lawsuit. App. 9a. The Court found that "the facts . . . do not support the allegation that there was ever any absolute ban on Ovadal protesting from bridges" in Madison. App. 9a.

Until November 29, 2005, the City of Madison did not have an express written policy banning all display of signs and banners on Beltline overpasses. App. 218a. On November 29, 2005, the City instituted such a policy by passing Ordinance 05-00193. App. 58a. The new ordinance prohibits hand carried or permanent signs on bridges or overpasses over expressways like the Beltline, other than official traffic control signs. App. 3a-4a. The ordinance was first effective a few days after the bench trial in December 2005. App. 3a. Adoption of the

ordinance was in direct response to the advice contained in the 2005 opinion of the Seventh Circuit, stating that a ban on all signs and banners displayed on Beltline overpasses would clearly be content-neutral. Thus, the City adopted the ordinance to establish a clear policy beyond challenge and to avoid future litigation of cases like this one.

Until the new ordinance's enactment, the mere presence of a sign, a group of signs, or a protest on a Beltline overpass was insufficient to warrant removal by the police. App. 220a-221a. If there was no significant impact on traffic safety, there was no City policy dictating removal. App. 220a-221a. Therefore, a "Go Team" sign, an anti-war sign, a pro-war sign, political candidate signs, or Ovadal's signs would not have been removed absent the added element of a significant impact on traffic safety. App. 224a.

In concluding that the police reaction to Ovadal's demonstrations on the two occasions in question was content-neutral, the Seventh Circuit found it noteworthy that Ovadal and his followers had demonstrated on Beltline overpasses with signs at least six times before the dates in question and once after the date in question without any police restrictions on their activities. App. 9a. Thus, the Seventh Circuit concluded there was no unwritten and widespread policy that effectively prevented Ovadal from engaging in protected speech. App. 8a. Because the Court found no constitutional violation, it never reached the questions of qualified immunity and municipal liability, issues which respondents raised as alternative grounds to affirm the judgment.

REASONS FOR DENYING THE PETITION

There are three primary reasons to deny the petition. First, Supreme Court precedent on the standard of review in First

Amendment speech cases is well-settled, a proposition with which petitioner agrees. Pet. Br. at 12. Petitioner claims there is a circuit split as to the application of specific facts to this established rule of law. However, as Supreme Court Rule 10 teaches, even if petitioner's analysis were correct (which it is not), the Court should deny certiorari review that would center on only allegedly erroneous factual findings or misapplication of a properly stated rule of law. In short, this petition simply plows old ground.

Second, petitioner's description of a circuit split is inaccurate. He contends that the First, Second and Seventh Circuits review *all* factual findings in First Amendment cases using a clearly erroneous standard, while the Third, Eighth and Ninth Circuits review *all* factual findings (other than credibility facts) using a *de novo* standard. Petitioner is incorrect. His characterization of the law is overly simplistic and fails to appreciate that not all facts are entitled to the same level of review under First Amendment law. Typically, a First Amendment case involves two types of facts: (1) non-constitutional facts, which a court reviews for clear error; and (2) constitutional facts, which a court reviews *de novo*. Although appellate courts use different words to describe non-constitutional facts (such as "predicate," "historical" and "non-crucial" facts), they generally apply the same standard of review depending on the specific facts at issue.

Third, the Seventh Circuit opinion at issue conforms with this Court's precedent recognizing the ability of a municipality to regulate the time, place and manner of protected speech if the restriction is content-neutral, narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels for communication of the speaker's message. This standard, enunciated in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and further explained in *Hill v.*

Colorado, 530 U.S. 703 (2000), was applied properly in this case, making further review wholly unwarranted.

I. SUPREME COURT PRECEDENT ON THE STANDARD OF REVIEW IN FIRST AMENDMENT CASES IS WELL-SETTLED.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), a defamation case, the Supreme Court noted that it does not merely explain constitutional principles; it also tries to make certain those principles are constitutionally applied. To do that, the Court examines for itself the allegedly defamatory statements at issue and the circumstances under which they were made to see whether the statements are of the character that the First Amendment protects. *Id.*

The Court's role as independent examiner in First Amendment cases was considered again, two decades later, in another defamation case, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). In *Bose*, the Supreme Court confronted an apparent conflict between Fed. R. Civ. P. 52(a), which provides that findings of fact shall not be set aside unless clearly erroneous, and the rule in First Amendment cases that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose*, 466 U.S. at 498-99, quoting *New York Times*, 376 U.S. at 284 and 286.

Bose explains that an appellate court's independent review of the record in a defamation case is necessary to determine whether the speech in question falls within a category of unprotected speech and also to insure that protected expression is not unduly inhibited. 466 U.S. at 505. To apply its independent judgment to the speech in question, the Court must

review findings of fact where such facts are so intermingled with a conclusion of law as to make an analysis of the facts necessary in order to pass upon the federal question. *Id.* at 509 n.27. Nevertheless, *Bose* clearly staked out the limits of an appellate court's independent assessment of the facts, writing as follows:

> There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan* and to which the clearly-erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not actually necessary to review the "entire" record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a "*de novo*" review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff.

Bose, 466 U.S. at 514 n.31.

Five years after *Bose*, the Court revisited the issue in *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989), a libel action against a newspaper. In *Harte-Hanks*, the Court held that credibility determinations are reviewed under a clearly erroneous standard because the fact-finder has had the opportunity to observe the witness, even though "the reviewing court must 'examine for [itself] the statements in issue and the circumstance under which they were made to see . . . whether they are of a character which the principles of the First

Amendment . . . protect." *Id.* at 688 (brackets and ellipses in original), quoting *New York Times*, 376 U.S. at 285. As part of its review of the entire record, the Court in *Harte-Hanks* gleaned from the jury verdict what facts the jury "must" have rejected and, based on those findings of fact, concluded that the newspaper acted with actual malice. 491 U.S. at 690-91. In short, the Court relied on jury findings as a predicate for its own independent assessment of the actual malice question.

Six years later, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567 (1995), a First Amendment case involving a parade permit under public accommodations law, the Court reiterated the confines of the independent judgment rule, noting that a reviewing court is "obliged to make a fresh examination of crucial facts" to determine whether First Amendment rights have been violated, but to do so without limiting its deference to the trial court on matters of witness credibility. For those propositions, *Hurley* cited the standards already established in *New York Times*, *Bose* and *Harte-Hanks*. *Id.* at 567-68. Thus, the rule of law petitioner wants reviewed in this case is one this Court has already addressed and settled in an unbroken string of opinions that need not be revisited.

II. THE CIRCUIT COURTS ARE IN AGREEMENT ON THE APPROPRIATE STANDARD OF REVIEW FOR FIRST AMENDMENT CASES.

A. The First, Second and Seventh Circuits Understand and Apply the Standard of Review Articulated in *Bose*.

Petitioner contends that the First, Second and Seventh Circuits review "all factual findings" in First Amendment cases under a clearly erroneous standard. *See* Pet. Br. at 18, citing *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006), *Gustafson v.*

Jones, 290 F.3d 895 (7th Cir. 2002), and *Duffy v. Sarault*, 892 F.2d 139 (1st Cir. 1989). This is incorrect. These circuit courts (as do the other circuit courts) draw a distinction between the types of facts at issue in a First Amendment case, namely, non-constitutional facts, which are reviewed for clear error, and constitutional facts, which are reviewed *de novo*.

Petitioner first cites a Second Circuit case involving government employee speech and contends that Judge Calabresi, in an unanimous opinion, applied the wrong standard of review. Pet. Br. at 18, citing *Locurto*, 447 F.3d at 177 n.6. However, petitioner's citation is incomplete and misleading. In support of its contention that the Second Circuit applies a clearly erroneous standard to all factual findings in First Amendment cases, petitioner quotes this fragment from a footnote in *Locurto*: "defendants' intent is a factual question, which we review for clear error . . . ." The full quote tells a different story, however, providing as follows:

> although the defendants' intent is a factual question, which we review for clear error, whether that intent ultimately amounts to "retaliation" forbidden by the Constitution is a question of law, which we review *de novo*.

Locurto, 447 F.3d at 177, n.6. As the full quote illustrates, the Second Circuit applies a clearly erroneous standard to the non-constitutional facts relevant to a defendant's intent and a *de novo* standard to constitutional facts, such as whether that intent actually amounts to a violation of the Constitution. That standard of review comports squarely with Supreme Court precedent.

Likewise, petitioner cites *Gustafson*, 290 F.3d at 906, a government employee speech case, for the proposition that the

Seventh Circuit reviews "all factual findings" in First Amendment cases for clear error. This too is incorrect. The Seventh Circuit held in *Gustafson* that:

> Whether a government employee's speech is protected by the First Amendment is a question of law that the district court properly withheld from the jury, even though it may have required predicate factual determinations. Although our review of the court's legal conclusions is *de novo*, we review the record as a whole, and we will accept the district court's conclusions of *historical fact* unless they are clearly erroneous.

Gustafson, 290 F.3d at 906 (emphasis added and citations omitted). Thus, the Seventh Circuit clearly distinguishes non-constitutional facts ("predicate" or "historical" facts) from constitutional facts.

Even if one could find ambiguity in the standard articulated in *Gustafson*, the Seventh Circuit has demonstrated its adherence to the Supreme Court's independent judgment rule in First Amendment cases on many occasions. In *United States v. Israel*, 317 F.3d 768, 770 (7th Cir. 2003), for example, the Seventh Circuit made the following observation:

> Where First Amendment concerns are at issue, appellate courts must conduct an "independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression."

Id., quoting *Bose*, 466 U.S. at 499. Likewise, in *A Woman's Choice - East Side Women's Clinic v. Newman*, 305 F.3d 684,

689 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003), the Seventh Circuit demonstrated its clear understanding of the review standard articulated in *Bose*, writing as follows:

> That admixture of fact and law, sometimes called an issue of "constitutional fact," is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects. Only the findings of historical fact are sheltered by Rule 52(a). Thus our consideration of the studies' *significance* is not deferential.

(emphasis in original).

Petitioner fares no better in asserting that the First Circuit misunderstands the review standard. For that proposition, petitioner cites *Duffy*, 892 F.2d at 145, a speech termination case decided by the First Circuit in 1989. The precise question *Duffy* addressed was whether *Bose* required *de novo* review of a finding that the defendant's termination would have occurred regardless of the plaintiff's protected conduct or whether a clearly erroneous standard applied to that determination. *Id.* at 143. After a lengthy recitation of the law concerning the standard of review in First Amendment cases, the First Circuit held that findings on what is protected free speech are reviewed *de novo* because these findings of fact "directly touch First Amendment rights." *Id.* at 145. Thus, the First Circuit clearly understood that it was required by *Bose* to undertake an independent review of the district court's ultimate finding that the defendant's statements to the press were protected under the First Amendment. *Id.* at 143. That being said, the court still applied a clearly erroneous standard to factual questions about whether speech substantially affected the defendant's employment decision and whether the defendant met his burden

of proof. As to those predicate questions, the First Circuit observed that they were "factual determinations subject to the clearly erroneous standard." *Id.* at 145. In making that distinction, the First Circuit did not misunderstand the independent judgment rule set forth in *Bose*.

As the case law reveals, the First, Second and Seventh Circuits do not apply a clearly erroneous standard to "all factual findings" in First Amendment cases. Accordingly, no circuit split exists and no review is necessary.

B. The Third, Eighth and Ninth Circuits Also Understand and Apply the *Bose* Standard of Review in First Amendment Cases.

Petitioner contends next that, in contrast to the First, Second and Seventh Circuits, the Third, Eighth and Ninth Circuits apply a *de novo* standard to all factual issues other than credibility facts. Pet. Br. at 15. However, as the discussion below reveals, all six circuits apply the same independent judgment standard of review articulated by this Court.

As to the Third Circuit, petitioner contends that it applies a *de novo* standard to all facts in a First Amendment case, citing *Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm.*, 896 F.2d 780, 783 (3d Cir. 1990), a case involving sexually explicit telephone messages. Pet. Br. at 15. But that is not quite what the case says. To the contrary, the Third Circuit held explicitly that "in the area of *constitutional* fact, we are not required to defer to factual inferences reached by the district court." *Id.* at 783 (emphasis added). In another more recent case, the Third Circuit again used the phrase "constitutional fact" to identify those issues that required independent appellate review. *Mitchell v. Horn*, 318 F.3d 523,

531 (3d Cir. 2003). Thus, the Third Circuit did not extend its *de novo* review to all facts, rather only to constitutional facts.

Moreover, the Third Circuit even applied a clearly erroneous standard in *Fabulous Associates*, the very case petitioner cites for the opposite proposition. Specifically, the court noted that the commonwealth of Pennsylvania never asserted that the speech at issue was obscene. 896 F.2d at 783. Therefore, no constitutional fact was raised. Because no constitutional fact was at issue, the appellate court and "the parties agree that [the] scope of review of the district court's findings of fact is under the clearly erroneous test." *Id.* Thus, *Fabulous Associates* illustrates that the Third Circuit applies a *de novo* review to constitutional facts and a clearly erroneous standard to non-constitutional facts.

The same is true for the Eighth Circuit. Petitioner cites *FAIR v. Nebraska Dept. of Social Services*, 111 F.3d 1408, 1411 (8th Cir. 1997), a speech case, for the proposition that the Eighth Circuit does not apply a clearly erroneous standard in First Amendment cases. Pet. Br. at 16. However, the Eighth Circuit has not painted with such a broad brush. To the contrary, the Eighth Circuit held in *FAIR* that it "review[s] findings of *noncritical* facts for clear error," but "independently review[s] the evidentiary basis of *critical* facts, giving due regard to the trial court's opportunity to observe the demeanor of witnesses." *FAIR*, 111 F.3d at 1411 (emphasis added); *see also Lundell Mfg. Co. v. ABC, Inc.*, 98 F.3d 351, 355-59 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (discussing in detail whether a particular fact is a constitutional fact requiring application of the independent judgment rule). As the holdings in *FAIR* and *Lundell* demonstrate, the Eighth Circuit distinguishes between critical and non-critical facts in determining the appropriate standard of review in First Amendment cases.

The Ninth Circuit also understands the nuanced standard of review articulated in *Bose*. Petitioner is simply wrong to contend that the Ninth Circuit applies a *de novo* standard to all factual findings in First Amendment cases, with the exception of credibility assessments. *See* Pet. Br. at 12, citing *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991). In its careful review of the applicable standard, *Newton* recognized that the Supreme Court had fashioned a process for reviewing evidence which "permits judicial protection of First Amendment values while still paying due deference to the fact-finding role of juries . . . ." *Id.* at 672. Thus, the Ninth Circuit understood that the rule of independent review allowed the appellate court to accept all the purely factual findings of the district court, but nevertheless to decide for itself whether the record as a whole demonstrated the existence of actual malice. *Id.* at 670.

The Ninth Circuit further explained its understanding of the standard of review in *Planned Parenthood v. American Coalition of Life*, 290 F.3d 1058 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003), a threat of force case under the First Amendment. After an exhaustive analysis of both Supreme Court and Ninth Circuit law on the standard of review in First Amendment cases, the Court held as follows:

> We will consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party. In this way we give appropriate deference to the trier of fact, here both the jury and the district judge, yet assure that evidence of the core constitutional fact — a true threat — falls within the

> unprotected category and is narrowly enough bounded as a matter of constitutional law.

Id. at 1070. This consistent approach is layered, but not unclear.

As the case law demonstrates, the Third, Eighth and Ninth Circuits, just like the the First, Second and Seventh Circuits, review non-constitutional facts for clear error and constitutional facts *de novo*. The appellate courts are not in disarray over the independent judgment doctrine.

C. The Seventh Circuit Applied the Proper Standard of Review in This Case.

As explained earlier, the Seventh Circuit has correctly articulated and applied the independent judgment rule in many First Amendment cases. *See Gustafson*, 290 F.3d at 906; *Israel*, 317 F.3d at 770; and *Newman*, 305 F.3d at 689. In this case, the Seventh Circuit did not spend much time explaining the intricacies of the standard of review, but nonetheless it applied the correct standard. *Ovadal v. City of Madison*, 469 F.3d 625, 630 (7th Cir. 2006) (*Ovadal II*). Moreover, even if the Seventh Circuit had failed to apply the correct standard, the case would not warrant certiorari review because, as Supreme Court Rule 10 explains, review is not granted to address allegedly erroneous factual findings or misapplication of a properly stated rule of law.

In the case at hand, the Seventh Circuit applied a clearly erroneous standard of review to the determination of driver intent, a non-constitutional fact, and a *de novo* standard to whether that intent demonstrated a violation of the First Amendment, a constitutional fact. *Ovadal II*, 469 F.3d at 630. As to the constitutional fact, the Court held that, if the findings

of fact supported the view that drivers on the Beltline created a traffic hazard in angry response to petitioner's message, then the police must permit the speech and control the crowd because there is no heckler's veto. *Id.* This application of the review standard comports with Supreme Court precedent as well as the law articulated in other circuits. In fact, the Seventh Circuit reached the same conclusion the Second Circuit had reached in *Locurto* on the issue of appellate review of intent findings. *Locurto* held that intent is a non-constitutional fact reviewed for clear error, but whether that intent ultimately amounts to a constitutional violation is a constitutional fact reviewed *de novo*. *Locurto*, 447 F.3d at 159 n.6.

Petitioner concedes, as he must, that credibility determinations are reviewed for clear error in First Amendment cases. Pet. Br. at 18. As explained in *Harte-Hanks*, 491 U.S. at 688:

> credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witness."

Id., quoting *Bose*, 466 U.S. at 499-500.

Gleaning intent on the basis of conflicting testimony is the epitome of a credibility determination. The Seventh Circuit understood this. It noted that the trier of fact plays a particularly significant role as the arbiter of credibility in weighing direct and circumstantial evidence. *Ovadal II*, 469 F.3d at 630. Deferring to the district court's credibility determinations on the issue of driver intent was, therefore, wholly proper.

The Seventh Circuit is not alone in recognizing intent as a fact-bound issue dependent on credibility determinations. This Court in *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998), characterized intent as "a pure issue of fact." Likewise, *Agfa Corp. v. Creo Products, Inc.*, 451 F.3d 1366, 1383 (Fed. Cir. 2006), observed that "findings of deceptive intent often require findings of credibility" and that "[c]redibility is unequivocally the province of the jury." *See also United States v. Nelson*, 450 F.3d 1201, 1209 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 326 (2006), a case "[a]ffording deference to the district court's credibility findings which are central to the question of discriminatory intent."

In sum, no conflict exists among the circuit courts and, moreover, the Seventh Circuit applied the correct standard of review in this case. Accordingly, the petition should be denied.

III. THERE IS NO NEED TO REVIEW THE SEVENTH CIRCUIT'S UNREMARKABLE CONCLUSION THAT A CITY MAY CONSTITUTIONALLY IMPOSE A CONTENT-NEUTRAL REGULATION ON EXPRESSIVE ACTIVITIES THAT CREATE SIGNIFICANT TRAFFIC HAZARDS.

Petitioner attempts to characterize this case as nothing more than the City impermissibly applying a heckler's veto to a run-of-the-mill demonstration. The facts paint a much different picture. Notably, petitioner fails to disclose the significant and undisputed fact that he had protested with signs on Beltline overpasses concerning his beliefs on homosexuality on at least six other occasions before and one occasion after the two dates in question and had interacted with police on several of those occasions without any restrictions on his activities. *Ovadal II*, 469 F.3d at 631; *see also* App. 53a, 100a. Because there was no observable traffic hazard on those occasions, there was no

restriction on his exercise of First Amendment rights. Based on petitioner's own experience, therefore, the City of Madison never had or enforced a content-based no-Ovadal-on-overpasses rule. App. 9a.

On two occasions in the fall of 2003, a significant traffic hazard did develop in response to the spectacle created by petitioner and his followers. During rush hour on the day after Labor Day, petitioner and nine others chose to express their views on homosexuality from a Beltline overpass. App. 81a. Petitioner and his group came equipped with two bright yellow banners, each 16 feet long by 2 3/4 feet wide, with large black lettering. App. 53a. The group had two or three additional signs, plus a large American flag. App. 82a. The Beltline overpass they chose that day is situated over a dangerous stretch of the Beltline for on and off traffic, with a through lane turning into an exit lane unexpectedly. App. 154a. One witness, Don Johnson, was traveling on the Beltline that day and saw vehicles slamming on their brakes and weaving out of their travel lane. App. 145a-146a. Johnson himself almost hit the vehicle in front of him. App. 145a. He testified he did not care what was written on petitioner's banners, but he did care about the situation developing in which someone was likely to get hurt. App. 147a, 149a. Johnson called 911, as did at least eleven other callers reporting their concern about near collisions on the Beltline near the site of the demonstration. App. 182a.

Even with a situation that unsafe, petitioner argues that the City was without power to impose any restriction on him to move his protest because doing so would be tantamount to a heckler's veto. Petitioner cites no law to support such a strident stance, much less an actual circuit court split on the issue. Indeed, petitioner's certiorari arguments on this question can be dispensed with quickly.

On the issue of a circuit split, petitioner contends that the Sixth Circuit steadfastly prohibits any regulation that turns on listener reaction. Pet. Br. at 22, citing *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992). Petitioner claims the Sixth Circuit holding in *Americans United* creates a circuit split from decisions issued by the Fifth, Seventh and Eighth Circuits. Petitioner's characterization is inaccurate. *Americans United* is an establishment clause case involving the placement of a menorah in a downtown public plaza. *Id.* 1539-40. The placement of the menorah had nothing to do with creating a traffic or safety hazard of any kind. *Id.* In fact, the Court's brief discussion of a heckler's veto was only a backdrop to its discussion of what it called an "ignoramus's veto," a phrase the Court used to characterize those individuals determined to perceive government endorsement of religion at every turn, even when no such endorsement exists. *Id.* at 1553.

Americans United cannot create a circuit split when it does not even address the same issues addressed by the Fifth, Seventh and Eighth Circuits in the cases petitioner identifies. The Fifth Circuit case, *Brazos Valley Coalition for Life, Inc. v. City of Bryan*, 421 F.3d 314, 326 (5th Cir. 2005), did not, as petitioner suggests, permit a heckler's veto. Instead, *Brazos* considered whether a property owner had any say in the matter if a stranger decided to plant a flag in the public right-of-way in front of the property owner's home. Allowing someone to do that, the Fifth Circuit correctly observed, would be analogous to sending a letter to the newspaper under someone else's name, something the First Amendment cannot be interpreted to condone. *Id.* at 326. Thus, *Brazos* is a far cry from a heckler's veto case.

There are many cases that do address governmental regulation of speech in the face of traffic and safety hazards

and, as one might expect, these cases do not allow for unbridled speech at any cost to the public. For example, in *MacDonald v. City of Chicago*, 243 F.3d 1021, 1025 (7th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002), the Seventh Circuit noted that an individual has the right to demonstrate and speak freely on controversial issues, but "that right does not allow him and other participants to create chaos by disrupting traffic, impeding pedestrians, endangering themselves or other people, and otherwise causing gridlock on the busy streets and sidewalks of the city . . . ." Likewise, in *Frye v. Kansas City, Missouri Police Department*, 375 F.3d 785, 791 (8th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005), the Eighth Circuit recognized that a City police department has the ability to regulate a protest on a content-neutral basis in order to alleviate the significant traffic hazard caused by the demonstration. *See also Faustin v. City and County of Denver*, 423 F.3d 1192 (10th Cir. 2005) (upholding ability to prevent anti-abortion banners from being displayed on highway overpasses because local government has a significant interest in traffic safety); *Sanctity of Human Life Network v. California Highway Patrol*, 129 Cal. Rptr. 2d 708 (Ct. App. 2003), *cert. denied*, 2003 Cal. LEXIS 6185 (2003) (upholding ability of police to discontinue anti-abortion demonstrations on freeway overpasses because of traffic hazard).

Indeed, this Court has repeatedly held that content-neutral regulations, such as those imposed on petitioner in this case, are constitutional. *See, e.g., United States v. Grace*, 461 U.S. 171, 177-78 (1983) ("We have regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'") (internal citation omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated

speech."); *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding constitutionality of statute establishing boundaries for protesting and leafleting at healthcare facility entrances because the statute in question reflected an "acceptable balance between constitutionally protected rights of law-abiding citizens and the interests of unwilling listeners.")

According to *Ward*, the controlling consideration in deciding content neutrality is the government's purpose in developing its policy. Here, the City's controlling consideration was traffic safety. Because the City's regulation of petitioner's expressive activity was justified without reference to the content of his message, it was, under *Ward*, content neutral. That is so whether or not the regulation "has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

Because it is well-established that municipalities may regulate expressive activities on a content-neutral basis in order to control traffic and safety hazards, the Court should deny Ovadal's petition for certiorari review.

CONCLUSION

For all the reasons discussed, the Court should deny Ralph Ovadal's petition for writ of certiorari.

Respectfully submitted,

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